JD–177–97
Cincinnati, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

READING ROCK, INC. Case No. 9–CA–34502

and

TRUCK DRIVERS, CHAUFFEURS AND HELPERS
LOCAL UNION NO. 100, AN AFFILIATE OF THE
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

James E. Horner, Esq.,
for the General Counsel.
Bruce A. Hoffman, Esq.,
(Graydon, Head & Ritchey),
of Cincinnati, Ohio,
for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cincinnati, Ohio June 26-27 and August 19-20, 1997. The charge was filed December 30, 1996 and the complaint was issued on April 17, 1997.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

Reading Rock, Inc., a corporation, manufactures and distributes building materials from its facility in Cincinnati, Ohio, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Ohio.[1] Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] Respondent has other facilities in Dayton, Ohio and at two locations in Kentucky that are only tangentially related, if at all, to the issues in this case.

II. Alleged Unfair Labor Practices

Overview/Issues Presented

On or about May 20, 1996, after an NLRB election, the Union, Teamsters Local 100, was certified as the exclusive collective bargaining representative for the employees in the following bargaining unit:

> All warehouse employees, production employees, installers, yardmen and drivers, **including drivers of owner operated trucks employed by Reading Rock, Inc.** at its 4600 Devitt Road, Cincinnati, Ohio, 2300 Arbor Boulevard, Dayton, Ohio; 10700 Dixie Highway, Richwood Kentucky; and 8252 Dixie Highway, Florence, Kentucky facilities, but excluding all mechanics, part-time employees, the salesperson, all office clerical employees, all other employees, and all professional employees, guards and supervisors as defined in the Act (emphasis added).

Collective bargaining negotiations between the company and the Union began June 27, 1996. Respondent was represented by Brian Campbell, its chief financial officer, its attorney, Thomas A. Brennan, of the law firm of Graydon, Head and Ritchey, and at times by Gordon Rich, Respondent's President. The Union was represented by Bruce Pence, its attorney of the law firm of Logothetis, Pence & Doll, and three of Respondent's employees, Mike Wells, Leslie Shawn Brock and Perry Allen. James Meyer, the business agent of Local 100 also attended some of the meetings. Jack Greschel, who is at least the nominal employer of some of the drivers working for Respondent, did not participate. The General Counsel contends that Reading Rock is a joint employer of Greschel's drivers.

At the outset of the negotiations Pence announced that he expected them to be concluded in about 60 days. In the Union's view, stalling in negotiations by Reading Rock in 1993 led to the decertification of the Union in 1995. Thomas Brennan denied that Respondent was under any obligation to complete the negotiations within this time frame.

Negotiations included 10 meetings, the last of which occurred on September 17. On September 18 the Union voted to strike. The strike began on September 23 and lasted until October 24, when the Union made an unconditional offer to return its members to work. While some Union members returned to work immediately, a number of others had been permanently replaced and were not recalled. Some of these have been recalled since October 25.

The Union and the General Counsel contend that Reading Rock insisted, as a condition of reaching any collective-bargaining agreement, that the Union agree to exclude drivers of owner-operated trucks and drivers employed by Jack Greschel from the bargaining unit. They also contend that Respondent bargained to impasse on this issue, which is a nonmandatory subject of bargaining.

The General Counsel and Union allege that Respondent violated section 8(a)(1) and (5) in bargaining and that therefore the strike was an unfair labor practice strike. Thus, they contend further that Respondent violated section 8(a)(1) and (3) in not recalling all the strikers immediately. Respondent, on the other hand, contends that the strike was an economic strike and it was entitled to deny immediate recall to employees who had been permanently replaced. Reading Rock claims that it did not insist on the exclusion of the "Greschel drivers" and owner-operator drivers from the bargaining unit, although Reading maintains that these drivers are not its employees. Respondent contends it did not bargain to impasse regarding exclusion of

these drivers from the bargaining unit.

The truck drivers servicing Respondent's Cincinnati facility

The truck drivers who haul materials into and out of Reading Rock's Devitt Road facility can be classified into three groups. First are about eleven drivers that both parties agree are Reading Rock employees. They drive equipment owned by Products Distributing Company, a corporation established by Respondent, for the sole purpose of purchasing equipment. These drivers deliver Respondent's building products in the Tri-State area (Northern Kentucky, Southwestern Ohio and Southeastern Indiana) near Cincinnati.

There is a second group of drivers that both parties agree are neither employees of Respondent nor members of the bargaining unit. They work for John R. Trucking Company, Royalty Trucking Company and Beamer Brothers Trucking Company. Employees of John R. and Royalty generally deliver products outside of the Cincinnati area. Beamer employees make local deliveries. John R. Royalty and Beamer do not operate under Reading Rock's PUCO (Public Utility Commission of Ohio) authorization number. Their trucks do not have a Reading Rock logo on them and their employees do not wear Reading Rock uniforms. These drivers, however, report to the Reading Rock dispatcher to get instructions before making their deliveries.

It is the third group of drivers around whom the controversy in this matter arises. Seven of them are employed by Jack T. Greschel, Sr., a sole proprietor, doing business as Greschel Trucking. Two of Greschel's drivers, Carl Root and Bob Wright drive dump trucks, primarily to pick up raw materials (such as sand and gravel) to be used at Reading Rock's manufacturing plant. The other five "Greschel drivers," John Cook, Dennis Hacker, Cecil Minor, Rick Kidd and Randy Smith, make deliveries of building materials for Reading Rock. In addition to the Greschel drivers, there are four drivers who own their own trucks. Two of these, Dean King and Robert Beech, operate, as does Greschel, pursuant to Reading Rock's PUCO number. King and Beech make local deliveries of Respondent's products. The two other owner-operators, Hubie Bolser and Paul Combs, make long-distance deliveries. All four were on the voter eligibility list for the NLRB election and the parties agree that they are in the bargaining unit.

Greschel Trucking

Jack Greschel began his relationship with Reading Rock in 1959, when he worked for it as a contract hauler. Between 1962 and 1965, he was Reading's plant manager. After three years working for somebody else, he returned to Reading as a contract hauler in 1968. He has purchased 11 trucks since 1968, some of which he financed through Products Distributing Company. As of the hearing he owned 9 trucks and had hired a driver for each of them. About 95% of the work performed with these trucks is performed for Reading Rock. Greschel, who is a specialist in the repair and maintenance of booms and electrical equipment, spends most of his time repairing and maintaining such equipment at Reading Rock's Devitt Road facility and an independently owned garage. Most of the equipment he works on is owned either by Reading Rock or himself.

Most of Greschel's truck drivers report directly to the Reading Rock facility and get their assignments from Reading Rock's dispatcher. The two dump truck drivers, on the other hand, are told by Greschel how much sand and gravel to pick up. Greschel's trucks, except for the dump trucks, have radios which enable them to contact the dispatcher throughout the day.

Greschel's drivers wear an uniform that says "Reading Rock"[2] and his trucks have a Reading Rock logo on them. Greschel's drivers punch the same time clock as do Reading employees, and Greschel co-ordinates any leave time for his drivers with Reading Rock. His employees receive safety awards from Reading and the Reading dispatcher maintains accident reports involving Greschel's drivers.

When Greschel hires new drivers, he gets help from Reading Rock. Several of his drivers were referred by Reading and he uses the same company, that Reading uses, to make background checks. Greschel conducts his pre-employment interviews at the Reading Rock yard and Reading employees explain how the drivers are compensated. Indeed, it appears that Greschel's pre-employment interviews are largely conducted by Reading Rock managers. Greschel's drivers are covered under the same health insurance plan as Reading drivers and Greschel has changed his vacation policy so that it would conform to Reading's.

Reading pays Greschel 93% of the value of each load and he pays his drivers 30% of what he receives. Fuel, which Greschel buys at Reading Rock, is deducted from his 93%. The same is true of road taxes, which are paid for him by Reading. Reading also pays Greschel's insurance which is covered by the 7% of the value of each load retained by Respondent.

Greschel has fired two drivers after being informed by Reading of problems with their driving records. In one instance, Reading informed him that its insurance carrier would no longer insure one of his drivers. In the other, Reading informed him that one of his drivers had a alcohol problem that disqualified him from driving under Department of Transportation regulations. Greschel has also disciplined drivers without any involvement by Reading Rock.

If one of Greschel's trucks breaks down, his driver may use one of Reading Rock's trucks instead. This occurs approximately once a month. The converse is also true. Reading Rock drivers have on occasion driven Greschel trucks while their equipment was being repaired.

Greschel drivers and the four owner-operators (Beech, King, Bolser and Combs) attend many of the same drivers' meetings as Reading Rock drivers. Greschel and one of his drivers also attended meetings of Reading Rock's Distribution Planning Committee in 1995. This committee discussed compensation and other issues affecting all the drivers operating from the Reading Rock yard, except those working for Beamer, Royalty and John R. Trucking companies.

The contract negotiations

At several bargaining sessions in July there was an extended discussion about the status of the "Greschel drivers" and the four independent operators. The testimony of the participants, most notably Pence and Brian Campbell, differs as to whether Reading Rock insisted that these employees were not part of the bargaining unit or merely not employees of Respondent. On July 24, Respondent gave the Union a seniority list which included the Reading Rock drivers, the Greschel drivers and the "independent" owner-operators. It also presented a comprehensive non-economic proposal (General Counsel Exh. 8). In that proposal it defined "employee" and stated that "...drivers of owner-operated trucks shall not be considered employees or an employee under this Agreement but shall have only the rights

[2] One of the dump truck drivers does not wear a Reading Rock uniform.

specifically noted in any specific Article or Section of this Agreement...", General Counsel-8, p. 3, section 2.

At the same meeting the Union presented an economic proposal (R. Exh. 9). With regard to driver compensation, the Union proposed that owner-operators be paid 93% of the haul charge it proposed. Reading Rock drivers would be paid 30% of this charge with 10% going towards drivers' benefits. This formula was also adopted by Respondent in an August 22 proposal (R. Exh. 9).

At this August 22 meeting, Reading also presented its first written proposal specifically addressing the Greschel drivers and owner-operators. It provided:

> 1. If Greschel is terminated as an independent contractor by Reading, either in hole or in part, Greschel drivers who drive for Reading Rock who meet the normal requirements of new hires upon completion of the probationary period, such an employee shall be credited with all seniority accrued with Greschel if working for Reading Rock including, 401(k) vesting, vacation and other benefits based on seniority. There shall be no other rights under this Agreement for Greschel drivers. This clause shall not apply if Greschel terminates; and shall not limit the company's right to subcontract as provided in the Management clause.
>
> 2. Independent contract drivers shall have no rights under the Contract.

G.C. Exh. 10(c).

Respondent contends that it limited the rights of the Greschel drivers and independent operators under the contract because it could not afford to pay Greschel and the independents 93% of the haul charge and also give Greschel drivers and independent drivers vacation and holiday pay, and a 401(k) plan.

At a bargaining session on September 10, Bruce Pence presented Reading with a hand-drafted counter proposal on this issue. It provided:

> Drivers of Leased Equipment
>
> It is agreed that the Employer may nego[iate] separately with owners of leased equipment concerning rental fees for equipment, driver compensation, and benefits.
>
> All drivers of leased equipment currently performing services for the employer shall be included on the master seniority list for drivers. To the extent that drivers of leased equipment are integrated into the daily operations of the employer, they shall be required to observe the general work rules and practices applicable to the drivers of company equipment. (i.e., job assignments, overtime assignment, reporting time, etc.,)

> Drivers of leased equipment may not file grievances concerning disputes regarding the terms of the contract between the Employer and the owner of the leased equipment. However, drivers of leased equipment may file grievances concerning day to day issues resulting from their integration into the daily operations of the employer.

General Counsel Exh. 13.

Reading Rock did not accept the above-quoted proposal. According to Brian Campbell, it was reluctant to give the Greschel drivers and owner-operators the grievance rights proposed by the Union. Pence advised Respondent's negotiators that he expected them to present a final economic proposal at the next meeting.

At the end of the September 10 session there were many unresolved issues. In addition to the dispute regarding the status of the Greschel drivers and owner-operators, the more contentious were the following: the union's demand that all employees be required to join the union as a condition of employment; and disagreement as to whether Reading would have an absolute right to subcontract work whenever it believed this was economically advantageous. The Union was determined to prevent Reading from contracting out work performed by bargaining unit employees.

Union meeting of September 15

The Union's bargaining committee met with the membership of Local 100 on the evening of September 15. In addition to Reading drivers, a number of Greschel drivers were present. There was extensive discussion about the status of the Greschel drivers. One or two of the Greschel drivers were very upset over the possibility that they would be treated differently under the company's proposal than Reading drivers. Pence asked the membership for a preliminary indication of whether they would authorize a strike if the company's proposals at the next meeting were unsatisfactory. The members voted overwhelmingly to authorize such a strike.

The September 17 bargaining session

On September 17, Reading presented a "final" economic proposal and another proposal on non-economic issues (General Counsel Exh. 14, dated September 16, 1996). Union negotiator Bruce Pence checked three sections of the non-economic proposal to determine whether there was any change from previous proposals that the Union regarded as unacceptable. He did not notice any substantive changes and therefore did not review the document further. The sections that he examined were as follows:

Article II (Recognition), section 2, which provided:

> For the purpose of this Agreement, the terms "employee" or employees" as used in this Agreement shall mean any employee or employee in the above described bargaining unit, who shall be the only employees covered by this Agreement, **except drivers of owner-operated trucks shall not be considered employees or an employee under this Agreement but shall have only the rights specifically noted in any Specific Article or Section of this Agreement as applicable to such driver of an owner-operated truck (emphasis added). . .** .

Article III (Management Rights): This article stated that the company had the right to "hire and lay off employees; hire or discharge temporary employees, probationary employees, **drivers of owner-operated trucks or non-bargaining unit employees for any reason whatsoever..."(emphasis added)**. In contrast, the company claimed the right to terminate or discharge non-temporary, non-probationary employees for just cause.

Article VII (Seniority), section 9:

> While drivers of owner-operated trucks shall not have any rights under this Article VII; the Company shall nonetheless have the right to determine when and under what circumstances drivers of such owner operated trucks shall be retained, dismissed, contracts terminated or laid off under this Article and in all events.

However immediately following the language above, on the next page, was a new provision regarding the Greschel drivers and owner-operators, which provided:

> Those drivers ("Lease Drivers") of leased equipment currently performing services for the Company listed on Schedule A,[3] attached hereto and made a part hereof, shall be included on the Company's master seniority list of drivers, but shall not be considered employees of the Company unless and until [the] Company lays off or otherwise terminates employees in accordance with the provisions of this Agreement or terminates in whole or in part a contract with the Owner of leased equipment so that a Lease Driver shall lose his employment with said Owner, but such Lease Driver shall be considered to have the same rights as employees of the Company for purposes of lay off or recall from the Company. Lease Drivers shall nonetheless remain employees of their respective employers, and shall be required to observe the general work rules and practices applicable to Lease Drivers under any contract between the Owner of said leased equipment and the Company until said Lease Driver becomes an employee of the Company through the lay off procedure under this Agreement. Lease Drivers shall not have the right to file grievances concerning the terms and conditions of any contract between the Owner and the Company, but shall have the right to file grievances only over applicable work assignments, lay off procedures and disciplinary matters not governed by the contract between the Owner and the Company, but shall not have the right to take such grievances to arbitration except for the failure to hire any Leased Driver as a result of application of lay off procedures under this Agreement.

G.C. Exhibit 14, page 10.

At the September 17 meeting, the Union made a verbal counter proposal on the economic package. It dropped, for example, its insistence that Reading participate in the Teamsters health and welfare fund. It agreed to participation in Respondent's plan if the company paid 100% of the cost. Reading offered to pay 70%. The parties also remained a 1/2 percentage point apart on wage increases.

[3] Brian Campbell testified that schedule A, which had not been drafted, would have been a list of the Greschel drivers and the four owner-operators.

The parties also failed to reach agreement on a number of non-economic issues--most notably the Union's proposed limitations on subcontracting, its demand for union security (requiring all members of collective bargaining unit to be Union members) and the issue of whether the Greschel drivers were recognized as employees of Reading Rock in the contract. James Meyer, the Local 100 business agent, who had attended the last few negotiating sessions, announced that there was a Union security clause in every one of the Local's contracts and that he would not accept any contract that did not recognize the Greschel drivers as employees of Respondent.

The Union meeting of September 18

The Union's negotiating committee met again with the Local 100 membership on September 18. Bruce Pence again discussed the dispute about the status of the Greschel drivers and owner-operators. At this time he may not have reviewed the company's proposal at page 10 of General Counsel Exh. 14. After listening to Pence, the Union membership reaffirmed its decision to go on strike. Either at the September 15 meeting or the September 18 meeting, either Pence or Meyer reviewed the status of the negotiations with regard to other issues, including wages, union security and subcontracting.[4]

Analysis

Reading Rock is a joint employer of the "Greschel drivers"

The General Counsel regards the issue of whether there is a joint employer relationship with regard to the Greschel drivers so important that it submitted a supplemental brief devoted solely to this issue. I agree with the General Counsel that Reading is a joint employer of the Greschel drivers, but I conclude that this is not critical to the resolution of this case. Thus, a conclusion that Reading violated section 8(a) (1) and (5) by insisting throughout the negotiations that the Greschel drivers are not its employees, does not necessarily follow from my finding that it is a joint employer of these drivers.

In *Laerco Transportation,* 269 NLRB 324, 325 (1984), the Board framed the joint employer issue:

> The joint employer concept recognizes that two or more business entities are in fact separate but that they share or codetermine those matters governing the essential terms and conditions of employment. Whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue. To establish joint employer status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction...

[4] Pence testified that only the status of the Greschel drivers was discussed at the September 18 meeting. Mike Wells and Leslie Shawn Brock, other members of the Union negotiating team, testified that no other issues were discussed on September 15. However, I conclude from the testimony of two other witnesses called by the General Counsel, David Stone and Leonard Lewis, that a number of other issues were discussed at one or both meetings. When the strike votes were taken, the Union membership was well aware of the failure to reach agreement on such items as wages, subcontracting and union security.

The Board concluded that Laerco was not a joint employer of employees provided to it by CTL, a company in the business of supplying labor to the trucking and warehousing industry. CTL employees worked at Laerco warehouses and other sites. CTL sent no supervisors to the Laerco sites and CTL employees were supervised to some extent by Laerco. However the Board in concluding that Laerco was not a joint employer, found that this supervision, although sometimes daily, was minimal and of an extremely routine nature.

In *Southern California Gas Co.,* 302 NLRB 456, 461 (1991), the Board declined to find Southern California Gas to be a joint employer of janitorial employees on its property. The janitorial company sent no supervisors to the site. The Board, however, concluded that the cleaning company's leadman was its supervisor.

The Board opined that a finding of joint employer status is warranted where the customer "meaningfully affects matters related to the employment relationship, such as hiring, firing, discipline, supervision and direction." It concluded that the record in *Southern California Gas* demonstrated only rare instances of direction of janitorial employees by Gas company personnel, which it deemed insufficient to characterize Southern California as a joint employer. Instead it considered the instances of gas company supervision as steps taken to assure receipt of contracted services and to prevent disruption of its own operations. The Board placed some significance on the fact that the janitorial company had contracts with other businesses.

However in *Holyoke Visiting Nurses Assn.,* 310 NLRB 684 (1993), the Board found the customer of a temporary labor agency to be a joint employer. The decision was enforced by the United States Court of Appeals for the First Circuit, which rejected the argument that the case could not be meaningfully distinguished from *Laerco Transportation. Holyoke Visiting Nurses Ass'n v. N.L.R.B.,* 11 F. 3d 302, 306-397 (1st Cir. 1993). The court approvingly cited the Sixth Circuit Court of Appeals' observation that a slight factual difference between two cases might tilt a case towards a finding of joint employment.

Among the factors which caused the Board to find joint employment in *Holyoke* (HVNA) were the following:

> HVNA had the right to refuse to accept the services of any employee of O'Connell, the temporary labor agency, it did not want; HVNA could effectively remove an O'Connell employee from any of its sites; The Association retained the right to schedule, assign and direct O'Connell employees; Holyoke's supervisors not only had the right to give directions to and assign O'Connell's employees; they did so;
>
> O'Connell nurses reported to HVNA supervisors at the end of each day and contacted HVNA supervisors if there was a problem with any patient.

Many of these factors are present in the instant case, although not necessarily to the same degree. It is also important to note that in the *Holyoke* case neither the Board nor the Court of Appeals found it dispositive that HVNA did not direct the manner in which O'Connell nurses performed their tasks or that O'Connell had contracts with businesses other than HVNA. In *Holyoke*, as in the instant case, the two companies in question employed the same

types of employees. Holyoke Visiting Nurses Association (HVNA) and O'Connell both employed nurses.

I conclude that the instant case is closer to the situation in *Holyoke Visiting Nurses* than to *Laerco Transportation* and *Southern California Gas Co.* The degree of supervision and control by Reading over the Greschel drivers is in large part indistinguishable from that exercised over those drivers on the Reading payroll. The Greschel drivers are easily distinguishable from those of contractors such as John R, Royal and Beamer, because they rarely, if ever, worked for anyone but Reading. Moreover, John R, Royal and Beamer drivers did not wear Reading uniforms or drive trucks with a Reading Rock logo. They were not nearly as integrated into Respondent's operations as the Greschel drivers. Indeed, the only significant distinction between the Reading drivers and the Greschel drivers was that the latter were compensated only indirectly by Reading through Jack Greschel. Even at that, Greschel tried to imitate Reading's compensation package very closely..[5] Accordingly, I find that they are joint employers.

Respondent did not insist on the exclusion of the Greschel drivers and owner-operator drivers from the bargaining unit. It did not bargain to impasse on this issue.

The General Counsel and the Union contend that Respondent violated section 8(a)(1) and (5) in insisting on the exclusion of the Greschel drivers and owner-operators from the bargaining unit, and in bargaining to impasse on this issue. I disagree.

A party may advance a proposal on a permissive subject of bargaining, such as exclusion of the lease drivers, even repeatedly, so long as it does not insist upon it as a price for an overall agreement. *See NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 349 (1958); *Reichhold v. NLRB,* 953 F.2d 594 fn. 2 (11th Cir. 1992), *Greyhound Lines,* 319 NLRB 554, 575 (1995). Certainly by the latter stages of the negotiations, Reading did not insist on exclusion of the Greschel drivers and owner-operators from the bargaining unit. In fact, it bargained with regard to these employees and agreed to their inclusion in the collective bargaining agreement for some purposes.

The company, however, maintained its insistence that the Greschel drivers and four owner-operators were not its employees. I conclude that the dispute between the Union and Reading on this issue was largely semantic in view of the Union proposal of September 10 and the company proposal of September 17. Indeed, Bruce Pence's testimony at hearing virtually concedes that there was no substantive difference between the two proposals. On direct examination he recalled:

> Q. What was the company's response to that exhibit, General Counsel's exhibit 13?
> A. ...Mr. Brennan took it. He said he would consider it. And I don't recall whether he had [an] immediate response or sometime later in the day, he asked me how that was different than what the Company had previously proposed.
>
> And I explained it to him again that, in my opinion, the document that I had drafted did not reach a legal conclusion about the employees for all purposes, but simply would include the drivers of leased equipment into the bargaining unit covered by the contract, but perhaps could not be construed as an admission by the Company that they were employees for all purposes and all other forums.
>
> I thought that's what the Employer's concern was. Our concern was to have

[5] Greschel drivers did not have a 401(k) plan; Reading drivers had such a plan.

them covered by the contract. And his response was, "How is that different than what I proposed?" And I told him what he had proposed was a blanket statement that the drivers of owner-operator equipment were not employees of Reading, and we could not agree to that.

Tr. 208-09.

Q. And, at whatever point in time you saw that [General Counsel-14, page 10], you didn't think it was important to contact the company and say gee, I overlooked this proposal, what did you mean by this?

A. No. I did not. And I also disagreed with the characterization that the drivers of leased equipment shall not be employees - - shall not be considered employees of the employer.

My proposal, as I explained earlier, was an effort to avoid that determination. In the proposal that I made there were no conclusory statements concerning the status of drivers of leased equipment. It simply said what would happen. Here is a clear declaration that the drivers of leased equipment would not be employees of Reading. That's not acceptable.

Tr. 371.

The language of the company's proposals makes a distinction between bargaining unit members and Reading employees. I do not believe that this is a meaningless distinction. Reading's last proposals accorded the Greschel and other lease drivers significant seniority rights under the collective bargaining agreement. Reading distinguished between the rights of drivers on its payroll and those on Greschel's payroll and the owner-operators for what appear to be legitimate economic reasons. Reading desired to preserve its flexibility with regard to its leases with Greschel and other owners of leased equipment. It also had a legitimate reason to treat drivers differently due to the payments called for under its lease agreements with Greschel and other owners (93% of the value of each load). Indeed, the Union proposal of September 10 recognizes the legitimacy of these concerns.

Further, I cannot conclude that Reading bargained to impasse on this issue. Indeed, the company's new proposal of September 17, and the Union's proposal of September 10, regarding these drivers, appear to be significantly similar in substance. At a minimum, the company proposal represented movement towards the Union's position in comparison to its prior proposals.

The Board has defined impasse as the point at which the parties are warranted in assuming that further bargaining would be futile, *A.M.F. Bowling Co.,* 314 NLRB 969, 978 (1994), enf. den. 63 F.2d 1293 (4th Cir. 1995). On September 10, the Union had acknowledged the company's right to negotiate with the owners of leased equipment concerning driver compensation and benefits. Its' primary concern seems to have been seniority rights for the Greschel drivers and owner-operators which appears to be accepted by company's September 17 proposal--at least with respect to possible lay-offs and recalls. The only difference in the two proposals appears to be the company's limitation on the right of drivers of leased equipment to take grievances to arbitration except with regard to lay-off procedures. Since the September 17 company proposal represented a considerable narrowing of the gap between the Union and Reading, I conclude that the Union was not warranted in assuming that further bargaining on this issue was futile. This is particularly so in light of the

fact that Bruce Pence, the lead Union negotiator, had not reviewed the company's September 17 proposal when he concluded negotiations were at an impasse.

The company's proposal of September 17 on lease drivers was sufficiently close to the Union's September 10 proposal that it is at least possible that the semantic differences could have been resolved. The company's new language of September 17 regarding lease drivers appears to be inconsistent with other portions of the same proposal, such as the afore-mentioned language in the Articles on recognition, management rights and the pre-existing version of section 9 of Article VII on seniority. However, one cannot rule out the possibility that further negotiations and improved drafting and/or editing of the company proposal might have removed any potential conflicts or ambiguities that are contained in the document. Moreover, given the lack of substantive differences in the Union's September 10 proposal and the new company lease driver language of September 17, I am unable to conclude that negotiations fell apart due to the company's intransigence on this issue.

The General Counsel has not established that the strike by the Union was an unfair labor practice strike

It follows from my conclusions herein that the strike that began on September 23 was not an unfair labor practice strike. The General Counsel does not allege any other basis for so characterizing the strike. Moreover, in light of what I conclude are the rather insubstantial differences between the Union's September 10 proposal on "leased drivers" and the company's September 17 proposal, I cannot credit the testimony of the witnesses who testified that it was the company's intransigence on this issue that caused the Union to strike.

It is impossible to know what the majority of the Union members thought or understood when they voted to strike on September 18. However, I conclude that Union's negotiating team knew that many issues important to the Union had not been resolved to their satisfaction. Primary among these issues were the company's insistence of its freedom to subcontract and its unwillingness to require all employees to be Union members. I infer that these issues were paramount in the decision of Pence and Meyer to push for the strike vote, no matter how they characterized the issue to the Union's members. Moreover, if they failed to explain the company's latest proposal on the leased driver issue, one cannot conclude that the strike was due to the company's failure to bargain in good faith on this issue.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 27, 1997.

Arthur J. Amchan
Administrative Law Judge